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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, ET AL.,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, IN OPPOSITION.

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THE DARNELL-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The district court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 80-86. The opinion of the court of appeals (R. 109-124) is reported in 212 F. 2d 22.

JURISDICTION.

The judgment of the court of appeals sought to be reviewed was entered on March 19, 1954 (R. 124). The petition for a writ of certiorari was filed on June 11, 1954. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code.

QUESTION PRESENTED.

When a union files a claim with the National Railroad Adjustment Board to a certain railroad position filled by a member of another union, whether Section 3 First (j) of the Railway Labor Act requires the Board to give due notice of hearings to the incumbent and his union.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act (45 U. S. C. 153 First (j)) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT.

In June 1951, petitioner Order of Railroad Telegraphers (herein referred to as Telegraphers) instituted a proceeding in the National Railroad Adjustment Board, Third Division, claiming a Palestine, Illinois, position on the line of respondent Illinois Central Railroad. That position is presently filled by D. A. Shears, a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employes (herein referred to as Clerks). (R. 45, 81.)

After the Telegraphers' claim was docketed by the Board, the Clerks wrote the respondent carrier that the position in question was covered by a contract between the Clerks and the Carrier, and that if the Telegraphers were successful in their claim before the Board, the Clerks would present to the Board a claim based on the same employment rights (R. 48, 82).

In August 1951, the respondent carrier filed its submission with the Board stating, *inter alia*, that the position was occupied by a member of the Clerks, that the work was of the type customarily performed by clerical forces, and that the claim was in substance between the Telegraphers and Clerks and should be dismissed unless the Board permitted each organization to present its side of the case (R. 45-46, 81).

The ten-member Board deadlocked on the merits of the case. Consequently, the National Mediation Board appointed a referee to resolve the deadlock, pursuant to Section 3 First (1) of the Railway Labor Act (R. 44, 80-81).

On May 13, 1953, when the case came on for hearing before the Board and the Referee, the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered for the first time (R. 46, 81-82).

The due notice point was the subject of a motion of a respondent Carrier Member, who objected to proceeding with the case until due notice was served on "the employees involved", whom he defined as "the Brotherhood of Railway Clerks or constituents thereof" (R. 24, 25-26, 46, 81-82). He pointed out that the Clerks had served notice upon the respondent carrier of their intention to prosecute a claim for the same work in-

volved in the proceeding before the Board in the event that the Telegraphers' claim were sustained by the Board (R. 24).

Pursuant to its custom when considering matters of procedure, the Board excluded the Referee from consideration of the due notice question (R. 26, 46, 82). At the executive session of the Board, the Carrier Member's motion that the Board not proceed with the claim "for want of jurisdiction" resulted in a tie vote and therefore failed to carry (R. 24-25, 46, 82).

The public session of the Board was then reconvened with the Referee present. In accord with the usual practice of the Board, the Referee was not requested to vote on the due notice question, nor did he request an opportunity to do so. (R. 24, 46, 82.)

After the public session reconvened, a respondent Carrier Member again objected to proceeding until due notice had been given pursuant to Section 3 First (j) of the Railway Labor Act. Nevertheless, the hearing was resumed. (R. 46, 82.)

On May 22, 1953, the respondent carrier filed a verified Complaint (R. 2) and thereafter moved for an order directing the defendants to serve due notice on D. A. Shears and the Clerks or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 5).

In the Complaint, the respondent carrier alleged that the Board has for several years denied the right of participation of any persons not formally served with notice, and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 47).

The Complaint pointed out that the Telegraphers were seeking to obtain a favorable Award on their claim, with no notice to the Clerks, and that the Clerks would then in turn seek a favorable Award, with no notice to the Teleg-

raphers.[1] Thus the respondent carrier would be required to employ two persons on one job. (R. 48.)

The five respondent Carrier Members of the Board filed an Answer admitting that under Section 3 First (j) of the Railway Labor Act due notice must be given to D. A. Shears and the Clerks. Their Answer showed that the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 21), and also showed that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954), on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 21-22, 28-30, 115).

In their Answer, which was supported by six exhibits (R. 24-43), the five respondent Carrier Members asserted that they are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 22).

The Carrier Members disclosed that only persons receiving formal notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 23).

The district court entered findings of fact and conclusions of law in favor of the respondent carrier (R. 80-84). Accordingly, a preliminary injunction was awarded which enjoined the Board from proceeding with this claim (1) until the Board gives formal notice to D. A. Shears and the Clerks, and (2) until the Board permits them to participate in the proceedings (R. 85-86).

[1] A chain of events of this very kind was described in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 303 (C. A. 7, 1951).

Petitioner Telegraphers and Labor Members appealed from the order of the district court (R. 89), but the Government did not appeal. The court of appeals affirmed the order of the district court, Judge Swaim dissenting (R. 109-124).[2]

[2] It may be noted that Judge Swaim concurred in the subsequent opinion in *Brotherhood of Railroad Trainmen* v. *Swan*, 26 Labor Cases, Par. 68,481 (C. A. 7, 1954), which required the district court to order the Board to give due notice to express-messengers and permit them to participate before the Board.

ARGUMENT.

1. Commencing in 1937, there have been at least five attempts to have this Court pass on due notice questions under Section 3 First (j) of the Railway Labor Act (*supra*, p. 2), and each time certiorari was denied. The court below properly held that Section 3 First (j) required the Board to give due notice of its proceedings to the incumbent of the position and his union. All the courts of appeals that have passed on the question have so ruled. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C. A. 3, 1951); *Estes* v. *Union Terminal*, 89 F. 2d 768 (C. A. 5, 1937); *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C. A. 7, 1951); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C. A. 8, 1950), certiorari denied, 340 U. S. 832.[3] To say that the incumbent and his union are not "employees involved" within the meaning of Section 3 First (j) "is so unrealistic as to be absurd." *Hunter* v. *Atchison T. & S. F. R. Co.*, 188 F. 2d 294, 300 (C. A. 7, 1951), certiorari denied, 342 U. S. 819. Petitioners rely (Pet. 14) on *Order of R. Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 156 F. 2d 1 (C. A. 8, 1946), certiorari denied, 329 U. S. 778, but that case was overruled by *Brotherhood of Railroad Trainmen* v. *Templeton*, *supra*, in which certiorari was also denied. Accordingly, there is no conflict of decision among the circuits.

2. Petitioners neglect to point out (Pet. 15) that only

[3] To the same effect, see *Brotherhood of Railroad Trainmen* v. *Swan*, 26 Labor Cases, Par. 68,481 (C. A. 7, 1954); *Allain* v. *Tummon*, 212 F. 2d 32 (C. A. 7, 1954); *Hunter* v. *Atchison T. & S. F. Ry. Co.*, 171 F. 2d 594 (C. A. 7, 1948), certiorari denied, 337 U. S. 916; *Nord* v. *Griffin*, 86 F. 2d 481 (C. A. 7, 1936), certiorari denied, 300 U. S. 673.

those receiving formal notice from the Board are permitted to participate before it (R. 42, 82). Consequently, actual knowledge of the proceedings would not suffice, for due process requires not only notice but an opportunity to be heard. *In re Central Railroad Co. of New Jersey*, 136 F. 2d 633, 639 (C. A. 3, 1943), certiorari denied, 320 U. S. 805. As was stated in *Allain* v. *Tummon*, 212 F. 2d 32, 35-36 (C. A. 7, 1954):

> Although we indicated in that opinion [*Hunter* v. *Atchison T. & S. F. R. Co.*, 188 F. 2d 294, 301, certiorari denied, 342 U. S. 819] that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process.

3. Judicial intervention was clearly warranted. For years the Board has refused to comply with the due notice mandate of Section 3 First (j) (R. 82, 83). In the instant case too, the Board had refused to give the required due notice and was proceeding to consider the merits (R. 46, 82).

Here the Board has glaringly departed from prompt and orderly procedure, and the respondents are endeavoring to obtain accomplishment of the purposes of the Act. In contrast to the cases relied upon by petitioners (Pet. 7-12), respondents are here trying to have the claim properly heard by the Board rather than to by-pass the Board. The whole purpose of this lawsuit is to have the Board decide the claim as soon as it gives the requisite notice.

This controversy arises because the Board is deliberately flying in the teeth of its known duty. In fact, it is persisting "with unabated fervor in its often criticized

practice". *Allain* v. *Tammon*, 212 F. 2d 32, 35 (C. A. 7, 1954). It is choosing to ignore the command of Section 3 First (j), as well as the myriad of judicial decisions thereunder. This is highlighted by the refusal of the Department of Justice to represent the Board in a similar case (R. 28-30). The Government neither joined in the appeal of this case nor the petition for certiorari.

The decision below does not interfere with the Board. All it does is require the Board to give formal notice to involved employees before proceeding further. Neither the district court nor the court of appeals made any attempt whatever to pass on the claim pending before the Board. They are merely insisting on the fair procedure specified in the statute and decisions thereunder.

Even if the Referee joined the Carrier Members in favoring due notice, still due notice would not be given to the incumbent or his union. The practice of the Board is never to give due notice unless all ten members concur. See concurring opinion in Award No. 6683, Appendix, *infra*. Therefore, the petitioners' contention that the Referee might still vote for due notice is entirely immaterial. In addition, the court below has held that the Referee is not entitled to vote on the due notice question. Certainly resolution of the basic question of due notice should not have to depend on whoever happens to be the Referee.

Petitioners' prematurity argument overlooks the point that the Board had no power to proceed until it complied with the statute. As the court below stated (R. 117):

> It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no

> concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong.

It is the recognized duty of the courts to act where, as here, there is "a jurisdictional frustration on the administrative level * * *". *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524.[4] As was said in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300:

> If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.

Here too, if the courts had no jurisdiction, there would be no remedy to enforce the command of Section 3 First (j).

Petitioners' argument against judicial intervention was well answered by the court below in stating (R. 118):

> Here, the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute. Nevertheless, we are urged to hold that it should be permitted to proceed to a hearing and

[4] See also *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 566; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187, 188; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562-563; *Chambers* v. *Robertson*, 183 F. 2d 144 (C. A. D. C., 1950), reversed on other grounds, 341 U. S. 37; *United States* ex rel. *De Lucia* v. *O'Donovan*, 178 F. 2d 876, 879-80 (C. A. 7, 1950), certiorari denied, 340 U. S. 886.

> a decision on the merits as a prerequisite to the right of a court of equity to interfere. Thus, a court before it can interfere must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic.

The contention (Pet. 10-11) that under the decision below, courts will have to resolve the question of which employees are entitled to due notice ignores all the decisions that have already determined that question (see p. 7, *supra*). Deadlocks on due notice have been caused, not by any confusion as to which employees should be given due notice, but by the obstinate refusal of some Board members to admit that Section 3 First (j) exists. Such deadlocks can be readily resolved by compliance with the instant decision.

4. The respondent carrier has no other adequate relief for a number of reasons. In the first place, the fact that it could defend against a suit to enforce the Board's decision on the ground that due notice was not given affords no real protection. Employees often resort to economic measures to enforce awards rather than risk enforcement suits. Carriers should not have to comply with invalid awards to avoid labor unrest and then have to pay other claimants who subsequently obtain valid awards. Even if a void award were set aside in enforcement proceedings, accumulated back-pay would be claimed in proceedings to enforce a later valid award reaching the same conclusion. Furthermore, if the carrier should secure reversal of a doubtful award in an enforcement action, the Board would still not issue the proper notice (R. 47, 82, 83; see also Appendix, *infra*), and this same action would have to be brought anew.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the respondent carrier would not be afforded protection in complying with an

award in favor of the claimant union. Yet a carrier should be entitled to have this controversy settled once and for all, in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards. Cf. *Kirby* v. *Pennsylvania Railroad*, 188 F. 2d 793, 799 (C. A. 3, 1951). It is grossly unfair for a carrier to be "double-barreled" by having conflicting awards against it, as happened in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C. A. 7, 1951), and as threatened here (R. 48). That is the answer to the following query posed by the court below (R. 119-120):

> It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.

In other words, due notice is withheld so that both organizations might secure favorable awards against a carrier.

The right to due notice, which is stated so explicitly in the statute, embodies elemental notions of justice and fair play that would apply even in the absence of statute. To deny those most vitally concerned in a controversy the right to be heard, as petitioners would do, subverts principles fundamental to the administration of the law. The courts of appeals have not disagreed as to their powers and duty in the premises. We earnestly submit, therefore, that no proper grounds have been asserted for the granting of this Court's writ of certiorari.

CONCLUSION.

The decision below was correct. Certiorari has been denied in five other cases involving due notice under the Railway Labor Act. There is no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July, 1954.

APPENDIX.

SPECIAL CONCURRING OPINION IN AWARD NO. 6683, DOCKET NO. CL-6614.

This is one of a line of four consecutive Awards entered by the Third Division on the same date. The full Opinion is found in Award No. 6680.

The referee makes reference in the full Opinion to what he calls the "Illinois Central case" and the "Allain case". These are respectively reported in 212 F. 2d 22 and 212 F. 2d 32. He points up the Court's language in the former case wherein it said, "At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard." And in all four of these Awards he has dismissed the claim. Therefore, we think that our Awards in this series are compatible with the first alternative expressed in the Opinion of the United States Circuit Court of Appeals.

This Board (Division) is a bipartisan creature of statute and is composed of five Carrier Members and five Labor Members. It employs, pursuant to the Railway Labor Act, an Executive Secretary. While its duty to give due notice is clearly expressed in the statute, the subject has proven to be of a most litigious character. The Executive Secretary has followed the practice of not giving due notice in those instances where it has been ordered by a referee Award unless the Labor Members' Chairman joins in giving him such direction. That direction has been withheld by the Labor Members of this Board irrespective of the many Court Cases holding the giving of notice to be our non-discretionary duty.

We can only look to the law and its interpretation by the Courts for our guide in the administration of our duty. Where that function is checked in the face of such a clear expression of our duty as lies before us in many cases, we are impelled to explain our position and concur in this referee's action, which we think is to "proceed no further" Similarly, when an Award has the effect of ordering due notice, and the actual giving of it is withheld, we are again of the opinion that we are still "proceeding no further". Surely, there can be no accumulation of liability under any claim beyond the point where this Board has failed to comply with what has been so effectively enunciated as its statutory duty.

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C. P. Dugan,
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